SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 72

JOHN M. LEHMANN, OFFICER IN CHARGE,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. BRUNO CARSON OR BRUNO CARASANTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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Opinions Below

The opinion of the Court of Appeals is reported at 228 F. 2d 142 (R. 23-31), and the memorandum opinion of the District Court is unreported (R. 10-11).

Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1955, and on January 30, 1956, a petition for rehearing was denied. The petition for certiorari herein

was filed on April 27, 1956, and was granted on November 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether an alien who entered the United States as a stowaway in 1919 and who was not deportable under the prior immigration law (Immigration Act of February 5, 1917), became deportable under the provisions of the 1952 Immigration and Nationality Act.

2. Whether an alien who was not deportable under prior immigration law (Immigration Act of February 5, 1917) for a criminal offense which was pardoned became deportable under the provisions of the 1952 Immigration and Nationality Act.

3. Whether the preservation of "any status, condition, right in process of acquisition, act, thing, liability or matter" and the continuation of the statutes repealed (the Immigration Act of February 5, 1917) "unless otherwise specifically provided," under the savings clause of the 1952 Act, protects respondent's nondeportable status under the 1917 Immigration Act.

4. Whether the provisions of section 241(d) of the 1952 Act (8 U.S.C. 1251d) relating to retroactive application of the deportation section specifically provided for the discontinuance of the Immigration Act of 1917 and the elimination of nondeportable status acquired thereunder.

Statutes Involved

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241(a), 66 Stat. 204, 8 U.S.C. (1952 Ed.) 1251(a):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry:

* * * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

Section 241(b), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251(b) provides:

"(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and

prosecution authorities, who shall be granted an opportunity to make representations in the matter."

Section 241(d), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251(d) provides:

"(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

Section 403(a), [66 Stat. 280] provides:

"The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(13) Act of February 5, 1917 (39 Stat. 874)."

Section 403(b) [66 Stat. 280] provides:

"(b) Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

Section 405(a), 66 Stat. 280, 8 U.S.C. (1952 Ed.) 1101 note provides:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization,

certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecution, suits, actions, proceedings, statutes [statuses], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

"Section 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States; . . . shall, upon

the warrant of the Secretary of Labor, be taken into custody and deported: . . . Provided further, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned . . ."

Statement

Respondent is a 53 year old native of Italy who came here in 1919 as a stowaway. He is married to a native-born citizen of the United States and is the father of four American-born children, the youngest of whom are aged 12 and 10 years. Respondent has been a carpenter and builder for several years, and his good character since 1941 is undisputed (R. 24-25).

In 1941 deportation proceedings were instituted against respondent based solely upon two convictions in 1936. These proceedings were cancelled in 1945 when Governor Lausche, of Ohio, granted respondent a pardon for one of his offenses conditioned upon his conducting himself thereafter as a law abiding person. This pardon indisputably granted respondent immunity from deportation under the law then in effect (R. 14, 24).

More than eight years later, in 1953, deportation proceedings were instituted anew against respondent under the 1952 Immigration and Nationality Act, although he had been law-abiding and of good character during the intervening period. An order of deportation was affirmed in 1954 by the Board of Immigration Appeals upon the ground that respondent was deportable for entry into the United States as a stowaway in 1919 and because of his two convictions in 1936. The pardon was refused recognition on the theory that it was not a full and unconditional pardon as required by the new law. The sole basis for the Board's decision was that section 241(d) [8 U.S.C. 1251(d)] ex-

empted the case from the operation of the savings clause of the 1952 Act (R. 18-20).

Respondent filed a writ of habeas corpus which was denied by the District Court (R. 4). It should be observed, however, that the same District Judge subsequently held in *U. S. ex rel Sciria* v. *Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955), that an alien in the respondent's situation was not subject to deportation and there stated that his conclusion in this case had been in error. The District Judge's confession of error is contained in a footnote to his filed opinion in the *Sciria* case which is not published in his reported decision. Reference is made to it, however, in the opinion of the Court of Appeals in the instant case (R. 29).

The Court of Appeals reversed the dismissal of the writ and held that respondent had a nondeportable status under prior legislation which was preserved by the savings clause of the 1952 Act (R. 27-31). A petition for rehearing was denied (R. 31). In the District Court (R. 10), in the Court of Appeals upon original consideration (R. 27) and upon petition for reconsideration, the sole issue raised was whether section 241(d) specifically removed respondent's nondeportable status from the savings clause of the 1952 Act.

The petitions for certiorari herein in the instant case and the companion case of Catalanotte (No. 435) likewise raised no issue of according respondents a status under prior legislation. Both petitions raised solely the issue whether Section 241(d) eliminated such nondeportable status. Upon this issue alone, certiorari was granted.

Summary of Argument

I

Petitioner urges for the first time in his main brief that respondent did not acquire a status under prior legislation.

This contention comes too late as it was not raised administratively, in the courts below or in the petition for certiorari. *United States* v. *Tucker Truck Lines*, 344 U.S. 33 (1952); *United States* v. *Hoffman*, 335 U.S. 77, 79 (1948); *Trailmobile Co.* v. *Whirls*, 331 U.S. 41, 48 (1946).

II

Respondent is not subject to deportation if his status of nondeportability was preserved under section 405(a), the 1952 Immigration and Nationality Act Savings Clause (8 U.S.C. 1101 Note). He was not subject to deportation under legislation which was in effect prior to the 1952 Immigration and Nationality Act. This, the Board of Immigration Appeals acknowledges (R. 14). Moreover, deportation proceedings instituted against respondent in 1941 resulted in a 1945 order declaring him nondeportable (R. 13, 14). His status of nondeportability was therefore adjudicated administratively. The contention of petitioner that respondent's nondeportability under prior law was not a status, condition, or right in process of acquisition preserved by the savings clause of the 1952 Immigration and Nationality Act, is clearly without merit. The term status is rich in legal meaning and one of the broadest terms known to the law. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586 (1951); *Shomberg* v. *United States*, 348 U.S. 540, 547, footnote 5 (1954); *Heikkila* v. *Barber*, 345 U.S. 229, 236 (1952); *Kwong Chew* v. *Colding*, 344 U.S. 590, 600, 601 (1950). It covers any condition in life determined by law. *In re Zeigler*, 143 N.Y.S. 562, 567, 82 Misc. 346 (1913), and is used on dozens of occasions in the Immigration and Nationality Act of 1952. 8 U.S.C. 1101(a)(20), 1101(a)(27)(c), 1154, 1251, 1251(a)(9), 1254, 1255, 1256, 1257, and 1503. *Senate Report 1515*, 81st Congress, 2d Sess., p. 591, which preceded the 1952 Act, employs the term precisely as did

the Court below, to describe the situation of deportable aliens who can have such condition adjusted to a nondeportable status. In addition, the words of the savings clause, "condition and right in process of acquisition" are broad enough to cover respondent's case.

III

Moreover, we submit that petitioner reads only portions of the savings clause and misconceives the issues presented. The savings clause not only preserved existing statuses, it also preserved the statutory *status quo*. *United States* v. *Menasche*, 348 U.S. at 535 (1954). Unless otherwise specifically provided, the alien's status or condition is preserved. Unless otherwise specifically provided, so the savings clause says, existing legislation, under which respondent is not deportable, is to be continued as to his case. The principal issue then is whether the old or the new law controls respondent's case.

The savings clause of the 1952 Act is the broadest ever enacted by Congress. In its original draft (S. 3455, 81st Congress, 1st Sess., section 361) it was confined solely to nationality matters. In later versions it was broadened and applied to the entire legislation. Completed and pending deportation proceedings were specifically preserved in the savings clause. Congress was aware that thousands of aliens had been ordered deported but that their deportation had not been effectuated. It was aware that thousands of deportation proceedings were then pending under the old law. It was aware that many thousands of aliens had adjusted their status or acquired nondeportable status. Administrative relitigation of these cases, totalling hundreds of thousands, would have imposed an impossible burden on our immigration officials. Congress hardly desired that. Withal, it had no desire to disturb adjusted

cases, many thousands of which it had approved itself in the form of private bills and suspension of deportation. The savings clause, we therefore submit, the broadest ever enacted, contemplated preservation of adjusted or acquired nondeportable status.

IV

The issue here resolves itself into one whether mere retroactivity of the deportation provisions of the 1952 Act (8 U.S.C. 1251-d) specifically exempts respondent's case from the operation of the savings clause. This issue was not the subject of certiorari, argument or decision in *Marcello* v. *Bonds*, 349 U.S. 302 (1955).

Every known rule of statutory construction requires the resolution of this issue in respondent's favor.

First, it is clear that Congress did not intend to carve out an exception to the savings clause by the language of section 241(d). The language of section 241(d) was drafted when there was no savings clause for deportation cases. S. 3455, *supra*. Accordingly, it could not have been designed to preclude the operation of the savings clause.

Secondly, the savings clause authorizes an exemption from its operation only where, otherwise specifically provided. The word "specifically" requires precision. It requires "precise or explicit designation." *Melnick* v. *Melnick*, 147 Pa. Sup. 564, 25 A2 111 (1942). Section 241(d) is wanting in any such precise or explicit designation of a savings clause exemption.

Thirdly, the statutory Congressional scheme provided a savings clause exception by employing the words "notwithstanding section 405" in 8 U.S.C. 1422, 1424a, 1426a, 1429 and 1442d. "The presence of such provision in one part and its absence in the other is an argument against reading it as implied." *United States* v. *Atchison T. & S.F.R. Co.*,

220 U.S. 37 (1910). There is no reason to suppose that Congress meant more than it said in section 241(d).

Fourthly, section 241(d) contains general language providing for retroactive application of some seven hundred grounds of deportation while the savings clause sets forth specific language preserving the *status quo*. The specific language of the savings clause should prevail over the general and vague langage of section 241(d). *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1931).

Fifthly, the cardinal principle of statutory construction is to preserve and not to destroy. *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 30 (1936). Preservation of the *status quo* of respondent is in line with this principle and the purpose of Congress herein.

Sixthly, if possible, effect should be given to all the words of a statute. *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882). The decision below accomplishes this objective (R. 30).

Finally, deportation statutes should be strictly interpreted to avoid banishment of a resident of forty-five years with an American wife and four native born children. *Fong Haw Tan* v. *Phelan*, 333 U.S. 10 (1947).

The decision below complies with these principles of statutory construction. It refused to authorize deportation in the absence of a clear Congressional mandate which is absent here. The judgment below should be affirmed.

I

Whether Nondeportability Is a Status Is a New Issue Which Petitioner May Not Raise for the First Time in This Court.

Before the Board of Immigration Appeals the issue presented was whether section 241(d) of the 1952 Immigration

Act "otherwise specifically provided" so that respondent's immunity from deportation under the 1917 Immigration Act was lost (R. 19). In the pleadings (R. 5), in the District Court (R. 10), and in the Court of Appeals (R. 27) this was the issue presented. In his petition for rehearing in the Court of Appeals and in his petition for certiorari, petitioner raised no other issue.

We believe that the contention that respondent had no status under the 1917 Immigration Act which could be preserved is completely without merit as we will demonstrate in Point II herein. In any event, we submit that it is too late to raise this issue now. Whether nondeportability was a status was not raised below or administratively.

1. It was not raised in the petition for certiorari and should not be considered as an issue before this Court. *Trailmobile Co.* v. *Whirls*, 331 U.S. 41, 48 (1946).

2. The issue was not raised administratively. It was not a basis of the decision of the Board of Immigration Appeals (R. 18-20). Failure to raise an issue administratively precludes its consideration judicially. *United States* v. *Tucker Truck Lines*, 344 U.S. 33 (1952); *U.S. ex rel. Vajtauer* v. *Commissioner*, 273 U.S. 103, 113 (1926).

3. The issue was not raised in the courts below and should not be considered for the first time in this Court. *United States* v. *Hoffman*, 335 U.S. 77, 79 (1948).

II

The 1952 Savings Clause, the Broadest ever Enacted by Congress, Requires Application of the 1917 Immigration Act to Respondent and Preserves His Status Thereunder.

Respondent was not subject to deportation under the 1917 Immigration Act (8 U.S.C. 155). The Board of Immigration Appeals so found (R. 14-15), and this much petitioner concedes.

Petitioner, however, now seeks for the first time to claim that respondent did not have a status under prior immigration legislation which could be preserved by the 1952 Immigration Act (Brief p. 24, No. 435, Brief p. 19, No. 72). Petitioner states that "mere nonaction" of Congress does not grant an "affirmative privilege" or status (Brief, No. 72, 19-20), that "in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application" (Brief, No. 435, p. 26), and finally that petitioner acquired no "vested right" to escape deportation. We have several answers to this belated frivolous contention raised outside the scope of the petition for certiorari. In brief, we will show that the term status in the 1952 Act savings clause is about as broad a legal term as can be imagined and that it encompasses and preserves respondent's nondeportability under prior legislation. In addition, the savings clause speaks of "conditions" and "right in process of acquisition." Petitioner avoids discussion of these terms which likewise cover respondent's nondeportability under the 1917 Act. Finally, we submit that the real issue here is not one of status, but rather one as to which law governs, the old or the new and whether section 241(d) by specific provisions prevents the continuation of the old law, preserved by the savings clause. Proper analysis of this issue initially directs attention to the Congressional history of the savings clause.

(A) History of the 1952 Act Savings Clause

1. *S. 3455, 81st Congress, 1st Session, Section 361.* This Court observed in *United States* v. *Menasche*, 348 U.S. 528, 532 (1954), that section 347 of the Nationality Act of 1940 (8 U.S.C. 747) was the direct antecedent of the 1952 Act savings clause. A comparative print of the two savings clauses is set forth in Appendix A herein. The 1940 Act

savings clause was originally taken verbatim and placed in the naturalization title (Title III) of the first McCarran bill (S. 3455, 81st Congress, 1st Session, section 361). The full text of these provisions is set forth in Appendix B to this brief. The only changes made in S. 3455 were (a) the addition of the words "status and condition" and (b) the provision that it was to apply "unless otherwise *specifically* provided" in the naturalization title (Title III). As worded and as set forth in Title III, the savings clause was strictly limited to nationality and naturalization matters. Significantly, it is a savings clause thus limited to naturlization matters which is analyzed by petitioner in his brief (No. 435, p. 22, footnote 11).

In S. 3455, section 402(a)(13), 402(a)(23) and 402(a)(39) repealed the existing immigration laws without any savings clause. The repeal of preexisting laws without a savings clause or a retroactive provision would have rendered previously deportable aliens immune. *United States* v. *Reisinger*, 128 U.S. 398, 480 (1888). Accordingly, to cover deportable aliens under preexisting law, it was necessary to provide in section 241(d) that the grounds of deportation be retroactive. This was the purpose of section 241(d) as revealed by its legislative history and as found by the court below (R. 30). Aliens deportable under preexisting laws were to remain deportable. S. 3455 further reveals that 241(d) was there set forth as in the final version of the law. It was not drafted to carve out a savings clause exemption because when it was prepared, there was no savings clause for deportation cases.

2. *S. 716, 82nd Congress, 1st Session.* S. 716 removed the savings clause from the nationality section of the bill and placed it in section 405, making it applicable to the entire Act rather than to the nationality section alone. To the

repealing section (403) was added a paragraph (b) reading:

> "Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

To section 405 there was added the phrase "right in process of acquisition." In addition the following were also to be preserved under the old law:

> "warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect. . . ."

Thus, as we will show later, Congress desired at minimum that deportation cases adjudicated administratively under prior law, as was respondent's situation, continue to be controlled by prior legislation.

3. *S. 2550, 82nd Congress, 2d Session.* S. 2550 added a further sentence to the savings clause reading as follows:

> "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the effective date of this Act, shall be regarded as a proceeding within the meaning of this subsection."

(B) The 1952 Savings Clause Is the Broadest Ever Enacted by Congress

1. The foregoing analysis of the successive stages through which the 1952 savings clause passed in the various drafts of the bills which led to the enactment of the 1952 Immi-

gration and Nationality Act shows that each bill enlarged the savings clause. From a savings clause limited to nationality matters, it was expanded into one covering the whole field of immigration and nationality. From a bill limited to proceedings, acts, things, and matters, it was expanded to one covering warrants of arrest, orders of deportation and exclusion, suspension and displaced person's applications, statuses, conditions, and rights in process of acquisition. The broadening of the savings clause with each successive draft speaks more eloquently of its all inclusive scope than any commentary in Congressional reports.

2. The history of other immigration and nationality savings clauses outlined in *United States* v. *Menasche*, 348 U.S. 528, at 532 (1954), demonstrates, as this Court concluded, that the:

> "1952 Act made the enumeration of matters preserved . . . more complete and all inclusive" and that the "consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U.S. at 533, 535.

We submit that the Court below appropriately noted (R. 29-30):

> "Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. De Luca* v. *O'Rourke*, 213 F. (2d) 759 (8 Cir. 1954); *Yanish* v. *Barber*, 211 F. (2d) 467 (9 Cir., 1954); *Ex parte Robles-Rubio*, 119 F. Supp. 610 (N.D. Cal., 1954); *Yanish* v. *Barber*, 128 F. Supp. 240 (N.D. Cal., 1955); *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va., 1953), aff'd per curiam

sub nom. United States v. Pringle, 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States* v. *Matles-Freidman,* 115 F. Supp. 261 (E.D. N.Y. 1953); *United States ex rel. Circella* v. *Neelly,* 115 F. Supp. 615, 625-626 (N.D. Ill., 1953)."

3. In discussing the 1952 savings clause, the District Court in *Yanish* v. *Barber,* 128 F. Supp. 240, 242 (N.D. Cal. 1955), observed:

> "It is difficult to imagine a more inclusive savings clause. . . ."

The 1952 Act savings clause has been described as one of "unusual breadth." *Ex parte Robles-Rubio,* 119 F. Supp. 610 (N.D. Cal. 1954). That it is broader than the savings clause of the 1940 Nationality Act (8 U.S.C. 747a) is beyond dispute. Yet, that savings clause was described as being "about as broad as language could be." *Bertoldi* v. *McGrath,* 178 F. 2d 977, 978 (CA.D.C. 1949).

The narrowness of other savings clauses only serves to emphasize the broad scope of the 1952 Act. The Selective Training and Service Act of 1940 (50 App. U.S.C. 316) merely preserved offenses committed prior to such Act. The Criminal Code (Act of June 25, 1948, 62 Stat. 683) preserved rights and liabilities under repealed statutes. The Bankruptcy Act of March 18, 1950, preserved existing penalties, forfeitures and liabilities (64 Stat. 420; 11 U.S.C. 1 Note). The Patent Act of July 19, 1952, enacted during the same session of Congress as the Immigration and Nationality Act, protected existing rights and liabilities. (66 Stat. 792, 815). Thus, it is clear beyond peradventure that the savings clause here under consideration was intended to be and is the broadest ever enacted by Congress.

(C) The Savings Clause Requires Application of Existing Law Unless "Otherwise Specifically Provided"

Discussion of the interrelation of the savings clause (section 405) to the deportation section (241) is reserved until Point III. Here our purpose is to define and analyze the savings clause.

1. *Existing Law Preserved*

Section 405(a) has a dual aspect. It preserves "any status, condition, right in process of acquisition, act, thing, liability, obligation or matter, . . . warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding" existing on its effective date unless otherwise specifically provided. In addition, it continues as to all such preserved items the statutes repealed "unless otherwise specifically provided."

The foregoing clearly demonstrates that the issue is not solely preservation of status, but an issue as to whether the old or the new law controls. The problem is succinctly covered by this Court's observation in *United States* v. *Menasche, supra,* 348 U.S. at 435, that under the savings clause: "the statutory *status quo* was to continue. . . ."

The issue is similarly analyzed in 2 *Sutherland, Statutory Construction,* 3rd Ed., Section 4937:

> "'A savings clause is, like a proviso, an exemption from the general operation of a statute. It is generally employed to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights; penalties incurred and pending proceedings. A repeal destroys such rights, powers and proceedings and discharges the penalties. Thus to preserve them a special provision with saving effect is necessary."

2. *Existing Statuses Preserved*

The 1952 savings clause specifically preserves any status existing under former legislation. Petitioner argues that mere non-action by Congress does not create a status (Brief, No. 72, p. 19), than an alien must go "at least part way toward satisfaction of the requirements set forth by Congress with respect to certain privileges relating to immigration and naturalization" (No. 435, p. 26) in order to acquire a status. What requirements petitioner contemplates are not described. Finally petitioner shifts from the status question and asserts that respondent acquired no "vested right" with respect to deportation (No. 435, p. 29).

The issue is not whether respondent acquired a vested right to remain here. This Court sustained the power of Congress to retroactively deprive an alien of his residence here in *Marcello v. Bonds*, 349 U.S. 302 (1954). The issue, however, is whether Congress through its statutory enactment has preserved respondent's residence here or taken it away. As we have indicated above, the present controversy can be solved by determining whether the old law or the new applies without defining the terms "status, condition, or right in process of acquisition." It should be observed, moreover, that although these terms were originally inserted to resolve a conflict in derivative citizenship cases as petitioner asserts (No. 72, p. 21), when the savings clause was expanded to cover deportation cases, it was no longer so limited [see Point II(A), *supra*].

This conflict in derivative citizenship cases was between *U.S. ex rel. Aberasturi* v. *Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause "a mere condition unattended by any affirmative action by the alien or by anyone else," and *Bertoldi v. McGrath*, 178 F. 2d 977 (C.A.D.C. 1949), which reached a contrary result.

The present savings clause is, as petitioner admits, "an obvious attempt to overcome the *Aberasturi* case." (Brief, No. 435, p. 22, footnote 11). Accordingly, this Court observed in *United States* v. *Menasche*, 348 U.S. at 535:

> "It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi* involved a situation where the alien had failed to take *any* affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress was willing to preserve a 'mere condition unattended by any affirmative action,' we think its savings clause also reaches instances, such as this, where affirmative action is present."

Petitioner's argument that some affirmative action was required to preserve respondent's status, therefore, can not be sustained. However, if affirmative action is required, in the instant case such action was taken by the Government. Here deportation proceedings were instituted in 1941, and it was administratively adjudicated in 1945 that respondent was not deportable (R. 14, 15, 24). Additionally, respondent's long residence here, i. e., entry in 1919, afforded him immunity from deportation on the stowaway charge (R. 30, 31). Of interest in this connection is this Court's statement in *United States* v. *Menasche*, 348 U.S. at 536:

> "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under § 405 (a). . . . But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in § 405(a), derived verbatim from § 347 (a) of the 1940 Act. . . ."

Moreover, there has been an affirmative determination by Congress itself to save from deportation those aliens who are in the respondent's circumstances. By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155), Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip aliens of advantages gained under prior laws." *United States* v. *Menasche,* 348 U.S. at 535.

Petitioner would encase the term "status" in a verbal straight-jacket and deny the immunity granted respondent under prior laws by equating status to a "vested right" which we do not assert. That respondent was not deportable under prior laws is acknowledged by the Board of Immigration Appeals (R. 14). We believe that it is not necessary to refer to this as a nondeportable status if prior laws control as we contend. We submit, however, that the Court below properly referred to this as a status of nondeportability (R. 29).

The term status has a long history in immigration terminology, and it is rich in legal meaning. "Whenever a condition in life is determined by law, and not by act of the parties, it is correctly denominated a status in jurisprudence, and even in the terminology of the common law itself." *In re Zeigler,* 143 N.Y.S. 562, 567, 82 Misc. 346 (1913). There is the status of husband and wife, marital status, the status of parent and child, of adoption and guardianship. *Restatement of Conflict of Laws,* p. 181-182. We speak of the status of an alien, *Harisiades* v.

Shaughnessy, 342 U.S. 580, 586 (1951), enemy alien status, *Shomberg* v. *United States*, 348 U.S. 540, 547, footnote 5 (1954), the status of citizenship or eligibility for citizenship, *Heikkila* v. *Barber*, 345 U.S. 229, 236 (1952), the status of a continuous resident (alien) physically present in the United States, *Kwong Chew* v. *Colding*, 344 U.S. 590, 600, 601 (1950), and legal status to institute or maintain a lawsuit. *Doremus* v. *Board of Education*, 342 U.S. 429, 436 (1951). Mr. Justice Douglas, dissenting.

The term is no stranger to those familiar with our immigration laws and practices. For years our immigration authorities have maintained a status section in its Washington and district offices charged primarily with supervision of the status of aliens here on temporary basis. *Immigration Manual* (1946), p. 1011. As early as 1926 immigration regulations were concerned with the status of visiting aliens, *U.S. ex rel. Lam Shin Hing* v. *Corsi*, 4 F. Supp. 591, 593 (S.D.N.Y. 1933). Immigration decisions speak of status as an alien, *Matter of C.*, V, I&N Dec. 370, 371; diplomatic status, *Matter of S.H.C.C.*, IV, I&N Dec. 36, 42; status as a student visitor, *Matter of A.I.C.*, IV, I&N Dec. 630, 631; and non-immigrant status, *Matter of DeP.*, I, I&N Dec. 151.

Senate Report 1515, 81st Congress, 2d Session, p. 591, which preceded the introduction of the bills culminating in the 1952 Immigration and Nationality Act, devotes a chapter to "adjustment of status." It is there stated:

> "Legality of *status* is a matter of degree. Most aliens in this country are here lawfully for all purposes. A few are eligible for reentry documents, but do not have *status* sufficient for naturalization purposes; a large number are eligible neither for naturalization nor reentry documents, but still are not deportable; *and many are subject to deportation, yet eligible to have that status changed without deportation.*

"*Status* may be adjusted by administrative procedure, treaty, registry, suspension of deportation, voluntary departure, or preexamination, change of *status*, or an act of Congress."

Thus, Congress, itself, placed aliens subject to deportation in a status. By the same token those not deportable had a status and it is significant that the 1952 Immigration and Nationality Act, and particularly the immigration sections frequently use the term status.

Section 101(a)(20) [8 U.S.C. 1101(a)(20)] refers to the status of lawful permanent residence, section 101(a)(27)(c) [8 U.S.C. 1101(a)(27)(c)] to nonquota status, and section 204 [8 U.S.C. 1154] to immigrant status.

Chapter 5 which precedes section 241 (8 U.S.C. 1251) is headed "Deportation; Adjustment of Status." Section 241(a)(9) [8 U.S.C. 1251(a)(9)] provides for the deportation of aliens who have violated their status as non-immigrants. Section 244 (8 U.S.C. 1254) authorizes the adjustment of status of deportable aliens. Sections 245 and 246 (8 U.S.C. 1255, 1256) provide for the adjustment of status from nonimmigrant to permanent resident and the rescission of such adjustment. Section 247 (8 U.S.C. 1257) authorizes the adjustment of status from permanent resident to nonimmigrant. Section 360(a) (8 U.S.C. 1503a) refers to the status of a national of the United States. Finally, the 1952 Act savings clause itself preserves applications for adjustment of status under the Displaced Persons Act (50 U.S.C. App. 1953).

In the light of this fertile and broad usage of the word status by the statute itself, by judicial and administrative decisions, by Congress and by the report preceding the introduction of the 1952 Act, there can be no doubt that the Court below correctly applied the term.

3. *Existing "Conditions" Preserved*

The 1952 savings clause preserves preexisting conditions. If respondent did not acquire a status, certainly the preservation of his condition of nondeportability is covered by the savings clause. Condition is defined by lexicographers as meaning "state of being," "characteristics" or "situation in relation to environment."[1] It frequently is employed legally to denote a circumstance or situation. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 630 (C.A. 3, 1953). It has been described as a word of flexible meaning and indefinite application, *Great Eastern Casualty Co.* v. *Smith*, 174 S.W. 687, 688 (Tex. Civ. App., 1915). The elasticity of the term "condition" in the context of the savings clause here involved, certainly encompasses respondent's situation of nondeportability.

4. *Existing Rights in Process of Acquistion Preserved*

Petitioner attempts to defeat the operation of the savings clause by asserting that the grant of a status of nondeportability to respondent would result in a vested right. The same surprising claim might have been made in *Bertoldi* v. *McGrath, supra*. There, as here, there was no claim of vested right. There a savings clause of narrower scope was held to cover inchoate rights or those in process of acquisition.

This Court observed in *United States* v. *Menasche, supra*, that under the savings clause the statutory *status quo* was to continue as to rights not fully natured." In *United States ex rel Zacharias* v. *Shaughnessy*, 221 F. 2d 578, 580 (C.A. 2, 1955), an alien illegally in the United States was held to have a status or right in process of acquisition by reason of steps taken by his wife to secure a visa. Re-

[1] Webster's Universal Dictionary, Oxford Universal English Dictionary.

spondent's position is stronger. Unlike Zacharias who was deportable under existing law, respondent had acquired a status or condition of nondeportability. He had a long residence here, and by appropriate further steps known as registry [8 U.S.C. 1946 Ed., 728b; *United States* v. *Anastasia*, 226 F. 2d 912 (C.A. 3; 1954)]; he could and can utilize that residence and nondeportable status for naturalization purposes. Thus respondent had rights not fully matured or in process of acquisition.

5. Existing Deportability, Nondeportability, as well as Deportation and Exclusion Proceedings Preserved

In the same fiscal year that Congress enacted the 1952 Immigration and Nationality Act, 516,082 aliens were admitted as nonimmigrants or as visitors, 265,520 were admitted for permanent residence, 20,181 aliens were physically deported, and 5,050 aliens had been excluded.[2] Thousands of additional aliens were ordered deported or excluded, but effectuation of such orders defeated for want of a receiving country.[3] In addition, from 1950 to 1953, 4,388 cases had been submitted to Congress for adjustment of status under section 4 of the Displaced Persons Act of 1948 (50 App. U.S. 1953).[4] Over the years 1942-1949 more than 15,000 cases had been adjusted through suspension of deportation[5] and 45,000 preexamination cases had been con-

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[2] Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1955, pp. 64, 75, 77, 84.

[3] Senate Report 1515, 81st Cong. 2d Sess., pp. 637-640, states that there are 3,600 nonenforceable deportation orders.

[4] Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1953, p. 37. Under the Displaced Persons Act an alien must show a legal entry as a visitor. However, he is often illegally here by reason of overstaying his visit.

[5] Senate Report 1515, supra, p. 906. Suspension of deportation requires that an alien be deportable, 8 U.S.C. 155(c), 62 Stat. 1206. The alien may be one who has entered the United States illegally. Upon Congressional approval of the case a record is made of his lawful residence.

sidered.[6] In addition, over the years several hundred private immigration bills have been enacted legalizing the status of deportable aliens.[7] These adjustment cases under the suspension provisions of the law (8 U.S.C. 155c and 8 U.S.C. 1254), under preexamination (8 C.F.R. 142, 1949 Ed.), under the Displaced Persons Act (50 App. U.S.C. 1953), and through private bills, all involved aliens who either entered illegally or who were subject to deportation prior to 1952. Under the terms of section 241(d), although their status has now been adjusted, all of these individuals are now deportable unless their status of nondeportability is preserved by the savings clause.[8] See: *U. S. ex rel. Sciria* v. *Lehmann*, 136 F. Supp. 458, 462 (N.D. Ohio 1955). In 1952 there were also 1,204 criminal prosecutions pending for violations under our immigration laws.[9]

Congress in enacting the savings clause did not desire to impose upon the Immigration Service the impossible task of retrying all these thousands of cases administratively. It is inconceivable that it considered upsetting the thousands of suspension cases and hundreds of private bill cases it had approved itself. Moreover, Congress continued its desire to accord favored treatment to aliens who had come here, as respondent did, prior to 1924.[10]

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[6] Senate Report 1515, supra, p. 907. Preexamination authorizes a deportable alien to proceed to Canada for the purpose of securing a visa and returning as a lawful permanent resident. 8 C.F.R. 142 (1949 Ed.).

[7] From 1939 to 1949, 249 of such private bills were enacted into law. Senate Report 1515, supra, p. 908. The figures since 1949 are much higher.

[8] Under the 1952 Act the original illegal entry or a subsequent entry of an alien may be utilized to predicate a deportation order. *Bonetti* v. *Brownell* (C.A. D.C. No. 12885, December 5, 1956).

[9] Annual Report, Immigration and Naturalization Service for the Fiscal Year ended June 30, 1953, table 49.

[10] "It is unreasonable to suppose that Congress would reverse its long standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise than by a plain and specific declaration of its

Accordingly, warrants of deportation under the prior law—issued after a deportation case was finally determined (8 C.F.R. 1952 Ed. 243. 1) were specifically preserved. Warrants of arrests initiating the deportation proceeding (8 C.F.R. 1952 Ed. 242. 1) were specifically kept in force under the old law under the savings clause. The deportation proceeding itself and statuses were likewise preserved. The savings clause specifically reads that unless otherwise specifically provided, nothing shall affect the validity of any:

> "warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect."

Obviously, Congress desired pending deportation proceedings whether completed or not to be governed by the old law. Why continue pending proceedings if they were to be relitigated when completed under the new law? Not only old orders of deportation were to continue in force, but old "documents or proceedings." In the instant case, the respondent's 1945 deportation hearing and order cancelling his deportation was a document or proceeding which was preserved even as a pending proceeding would have been. It matters not that the proceeding was begun in 1941 rather than in 1951 or that it had finally adjudicated. Congress by the savings clause desired no administrative relitigation of hundreds of thousands of cases. It desired to preserve pending and completed deportation proceedings, deportable and nondeportable statuses. This is clear

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purpose to do so." *U.S. ex rel. Sciria* v. *Lehmann, supra*, 136 F. Supp. at 462. Such aliens have been permitted to become lawful permanent residents by registry procedings under 8 U.S.C. 728b (1946 Ed.) and 8 U.S.C. 1259 (1952 Ed.).

from the historical background of the enactment and the broad encompassing language of the savings clause.

III

The Retroactive Deportation Provisions of Section 241 Do Not Specifically Provide an Exception to the Savings Clause.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause. We admit as did the Court below (R. 30) that some provisions of section 241 are retroactive and that others are not. Where prospective application of section 241 was desired, the word "hereafter" was used. Except as provided in section 241, section 241(d) made the deportation provisions retroactive. However, we do not reach the retroactive provisions of the new law unless the new law applies. We must, therefore, first determine which law is applicable. The savings clause preserves the statutory *status quo* and prevents the operation of the 1952 Act unless "otherwise specifically provided." *United States* v. *Menasche, supra; Shomberg* v. *United States, supra.* The heart of the issue herein, then, is not whether section 241 is retroactive, as all agree, but rather whether the old or the new law governs. Stated otherwise, the issue is whether the mere retroactivity of section 241(d) constitutes sufficient specificity to preclude operation of the savings clause.

(A) Meaning of Words "Otherwise Specifically Provided."

In section 403(b) Congress stated that section 405 applied "except as otherwise provided." In the Nationality

Act of 1940, 8 U.S.C. 747a, the savings clause applied, "unless otherwise provided."[11] However, in enacting section 405 Congress twice stated that it was to apply "unless otherwise *specifically* provided." Unless otherwise *specifically* provided the prior legislation was to govern. Unless otherwise *specifically* provided the existing status, condition, and right in process of acquisition were to remain valid.

The word, "specifically," meant something to Congress when it added it to the savings clause and when it inserted it in section 405 and not in section 403 or in other legislation. It is a term which demands precision. The word "specifically" as defined by the lexicographers and judicial decisions is equivalent to the word "precisely" or "expressly."[12]

Section 241 is not precise in carving an exception to the savings clause. On the contrary, it makes no reference to it at all. It is not explicit in directing whether aliens who have acquired an adjusted status or a nondeportable status under prior legislation and under judicial recommendations are now to become deportable. *U.S. ex rel.*

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[11] Savings clauses contained similar language ever since 1871 when Congress enacted a general savings clause to prevent release of liabilities under penal statutes "unless the repealing Act shall so expressly provide." 16 Stat. 432; 1 U.S.C. (Supp. V) 29; *United States* v. *Elam et al.*, 76 F. Supp. 723, 724 (D.C. W. Va. 1948); *United States* v. *Reisenger*, 128 U.S. 398, 480 (1888).

[12] "Specifically means in a specific manner, explicitly, particularly, definitely." *Straton* v. *Hodgkins*, 109 W. Va. 536, 155 S.E. 902 (1930). "Specific implies precise or explicit designation," *Melnick* v. *Melnick*, 147 Pa. Sup. 564, 25 A2 111 (1942). Specific means precisely formulated or restricted, definite, explicit, or an exact or particular nature. *People* v. *Thomas*, 25 Cal. 2d 880, 889, 156 P. 2d 7, 17 (1945). "The word 'specifically' is equivalent to the word 'definitely' or 'precisely.' *Emack* v. *Campbell*, 14 App. D.C. 186, 190 (1899).

The Century Dictionary and Encyclopedia defines specifically as meaning "particularly, definitely, explicitly." Funk and Wagnalls Standard Dictionary defines it as "expressly, explicitly, particularly, definitely."

De Luca v. *O'Rourke*, 213 F. 759 (C.A. 8, 1954); *U. S. ex rel. Carson* v. *Kershner*, 228 F. 2d 142 (C.A. 6, 1955); *U.S. ex rel Sciria* v. *Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955).

(B) Legislative History of Omission of Explicit Exception to Section 405

Section 241 did not and could not specifically suspend the operation of the savings clause when it was originally drafted. In its original form, S. 3455, 81st Congress, 1st Session, contained section 241(d), but no deportation savings clause. The savings clause for deportation cases was inserted in subsequent drafts. Nevertheless, after the savings clause was added and expanded in these subsequent drafts of the bill, no attempt was made to have 241(d) explicitly carve an exception to 405 by a cross reference to that section. The omission of any cross reference or explicit exception to section 405 is significant.

(C) Statutory Scheme for Exemption from Savings Clause

In the drafts which followed S. 3455 Congress methodically reviewed the various statutory provisions of the 1952 Act and carved out exceptions. In *Shomberg* v. *United States*, 348 U.S. 540 at 547 (1954), this Court noted that Congress had established a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case Congress specifically provided for such exemption by the language "notwithstanding the provisions of section 405 of the Act." This Court, in *Shomberg* v. *United States*, listed the sections exempt from section 405 as follows: Section 311 (8 U.S.C. 1422); Section 313(a) (8 U.S.C. 1424a); 315(a) (8 U.S.C.

1426a); 318 (8 U.S.C. 1429); and 331(d) (8 U.S.C. 1442d).[13] The fact that Congress said explicitly and clearly what it meant in these sections with reference to avoiding the savings clause is strong evidence that it did not mean what it did not "precisely" or "explicitly" say in section 241(d).

As Mr. Justice Holmes said in *United States* v. *Atchison T. & S. F. R. Co.*, 220 U.S. 37 (1910):

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. . . . We see no reason to suppose that Congress meant more than it said."

The presence of the phrase, "notwithstanding section 405," in sections 311, 313, 315(a), 318 and 331(d) and its absence from section 241(d) should foreclose reading it by implication into the section from which it is absent. The

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[13] Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, "notwithstanding section 405(b) this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act." 66 Stat. 239, 8 U.S.C. 1422, 8 U.S.C.A. 1422.

Section 313(a) states: "Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized" who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U.S.C. 1424(a), 8 U.S.C.A. 1424(a).

Section 315(a) provides: "Notwithstanding the provisions of section 405(b)," one who claims or has claimed his alienage and "is or was" thereby relieved of service in the armed forces, "shall be permanently ineligible to become a citizen." 66 Stat. 242, 8 U.S.C. 1426(a), 8 U.S.C.A. 1426(a).

Section 318 provides in part: "Notwithstanding the provisions of section 405(b), and except as provided in section 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other act . . ." 66 Stat. 244, 8 U.S.C. 1429, 8 U.S.C.A. 1429.

Section 331(d) provides for the ending of enemy alien status and states: "Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date." 66 Stat. 252, 8 U.S.C. 1442(d), 8 U.S.C.A. 1442(d).

difference in language indicates a difference in legislative intention. *Brewster* v. *Gage*, 280 U.S. 327, 336 (1929); *Crawford* v. *Burke*, 195 U.S. 176 (1904); *Pirie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, 448 (1900).

Shomberg v. *United States, supra*, is not to the contrary as petitioner asserts. On the contrary it supports our view. Congress in section 318 specifically carved out an exception to section 405(b) by using the notwithstanding language. Aliens found deportable were not to be naturalized under the Internal Security Act, 8 U.S.C. 729(c), 64 Stat. 1015, which was existing law, nor under the new law. The specific exemption from 405(b) which expressly covered naturalization proceedings was sufficient to carry an exemption from the entire savings clause and particularly from section 405(a). This Court made it quite clear, however, that in the absence of a *specific* provision to the contrary, the savings clause prevailed. It said (348 U.S. at 543):

> "We agree with petitioner that, absent a specific provision to the contrary, he has rights protected by § 405(a). . . . But we hold that § 318 specifically excepts rights under the prior law from the protection of § 405, when these rights stem from a petition for naturalization or from some other step in the naturalization process."

In a footnote to the last quoted sentence, this Court proceeded to leave open the question here presented, saying:

> "This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under § 241(a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings."

The issue continued to remain open after this Court's decision in *Marcello* v. *Bonds*, 349 U.S. 302 (1955). Petitioner misinterprets the scope of that decision, although fully aware of its complete background. Traditionally, this Court does not decide or foreclose issues not presented to it or in the Courts below. The present issue although presented administratively (Pet. Brief, No. 435, p. 17), was not raised by Marcello in the lower courts. *Marcello* v. *Bonds*, 113 F. Supp. 22, 212 F. 2d 830 (C.A. 5, 1954). That this issue was not before this Court was acknowledged by the Government in its Marcello brief. Marcello belatedly sought certiorari on this issue for the first time in a supplemental petition for certiorari which was denied, 348 U.S. 805. The petitioner, himself, described Marcello's argument in his brief as a mere suggestion that the savings clause applied.[14] The issue was not presented in oral argument by either side. This Court's *Marcello* decision does not discuss the savings clause or its interrelation with the deportation provisions. We submit that under the circumstances, the Court below was justified in concluding in No. 435 (236 F. 2d 955):

> "*Marcello* v. *Bonds*, 349 U.S. 302, cited by the Government, is not here applicable since it is not concerned with the savings clause which is the provision of the statute that controls disposition of this case."

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[14] In its Marcello Brief, No. 145, October 1954 Term, at page 41, footnote 8, the Government said:

> "While petitioner *suggests* in his brief (Pet. Br. pp. 41-42) that it is doubtful whether Section 241, when read in the light of the savings clause of Section 405(a) (Pet. Br. 61-62) can be applied retroactively to effect his deportation, *this contention is not properly before the Court*, since it was presented only in his supplemental petition for certiorari which was denied, 348 U.S. 805." (Italics supplied).

(D) Lack of Specificity of Section 241

Petitioner admits, as he must, that the words of art, employed by Congress elsewhere in the statute (the terms "notwithstanding section 405") are not employed in section 241. He contends that mere general retroactivity of the relevant provisions of section 241 is sufficient specificity to preclude operation of the savings clause. That was not the Congressional intent when section 241(d) was drafted (Point IIA, *supra*). On the contrary, the retroactive provisions of 241(d) were intended as the Court below stated, to cover aliens deportable under prior laws (R. 30). The Court below likewise found that section 241(d) did not explicitly disturb aliens in a nondeportable status (R. 29).

Respondent's status is governed by two "specific provision" requirements set forth in the savings clause. One relates to the status or condition of the alien. Unless otherwise specifically provided, nothing contained in the 1952 Act shall be construed *to affect any status (or) condition existing* on the effective date of the Act.

The second provision, which reinforces the first, relates to the continued effectiveness of the prior law. As to all such statuses or conditions, *the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.*

Thus, the savings clause demands specific language not merely to "affect" the respondent's status, but also demands a specific provision stating that the prior law is not continued in force and effect.

In view of these linked provisions, the familiar rule of statutory construction requires that the general language which has been used to encompass all of the numerous

classes of aliens described in section 241(a),[15] must succumb, even were there a conflict to the specific provisions of the savings clause.

As this Court declared in *MacEvoy* v. *United States*, 322 U.S. 102 (1943):

> "However inclusive may be the general langauge of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which might otherwise be controlling.' *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1931)."

In *National Labor Relations Board* v. *Jones and Laughlin*, 301 U.S. 1, 30 (1936), this Court stated the same principle:

> "(Courts) are not at liberty to deny effect to specific provisions which Congress has the constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. *The cardinal principle of statutory construction is to save and not to destroy.*" (Italics supplied)

The cases which have given detailed analysis to the problem have found the necessary specificity wanting in section 241(d). *U.S. ex rel. DeLuca* v. *O'Rourke*, 213 F. 2d 759, 764 (C.A. 8, 1954), holds 241(d) not sufficiently specific to disturb nondeportable status obtained through a judicial

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[15] The former Commissioner of the Immigration and Naturalization Service has testified that the 1952 Act sets forth over 700 different grounds of deportation and that under the prior laws there were 465 such grounds. *Hearings, Senate Appropriations Committee on Department of Justice Appropriation for 1954*, 83rd Cong., 1st Session, p. 250 (1953).

recommendation against deportation. In *U.S. ex rel. Sciria* v. *Lehmann*, 136 F. Supp. 458, 462, 463 (N.D. Ohio 1955), the District Judge in the instant case reversed himself. His *Sciria* opinion was relied upon by the Court below (R. 29). The Sciria opinion states that section 241(a) and section 241(d) [8 U.S.C. 1251]:

> "do not specifically provide for the deportation of aliens who were excludable under the law in effect at the time of entry but who acquired a status of nondeportability thereafter under prior law. . . . In the recent cases of *Ex parte Robles-Rubio*, D.C. 119 F. Supp. 610, and *United States ex rel. De Luca* v. *O'Rourke*, 8 Cir. 213, F. 2d 759, it was held that judicial recommendations under prior law which were effective to prevent the deportation of aliens convicted of illicit traffic in narcotics, continued to be valid under the savings clause of the 1952 Act notwithstanding the absence of any provision in the Act empowering judges to make recommendations against deportation in such cases. The same principle that governed in Robles-Rubio and De Luca would seem to be applicable here. The only essential difference between the cited cases and the case of petitioner relates to the manner in which the status of nondeportability was acquired.

In *Lee You Fee* v. *Dulles*, 133 F. Supp. 160, 236 F. 2d 885 (C.A. 7, 1956), now pending upon an application for certiorari (No. 643), the retroactive provisions of section 310(c) of the 1952 Act (8 U.S.C. 1401(c)) were also held to be wanting as an express exception to the savings clause.

Against the specific and express provisions of the savings clause, petitioner tilts the general, 700 ground-covering-phrase in section 241(d) to establish respondent's deportability. In the light of the Congressional policy to

preserve for aliens advantages acquired under prior legislation, and in the light of the use by Congress of such express language as "notwithstanding section 405," we submit that no language short of an equally express statement should be held to overcome the savings clause.

(E) Policy of Preservation

"The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936). Accord, *United States* v. *Menasche*, 348 U.S. at 538 (1954).

Congress intended to preserve orders of deportation and pending deportation proceedings under prior legislation. It intended to preserve the thousands of prior law adjustments of status acquired through suspension of deportation, preexamination, registry, and under the Displaced Persons Act [Point II(c)5]. This Court should similarly uphold the Congressional intention to preserve rather than to destroy the statutory *status quo* and the nondeportable status here involved.

(F) Giving Effect to All Parts of the 1952 Statute.

It is the Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882).

The Court below properly applied this principle. As it observed, the arugment of petitioner would effectively emasculate the savings clause (R. 30). The effect of his argument is that where there is a change in the statute relating to deportation having retroactive effect, the savings clause has no application. It is however, only in such cases that the savings clause is of importance. This precise point is made in the *Shomberg* opinion:

> "If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the

new Act *affects* petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exemption. Only where something in the new law introduces a change, *thereby affecting one's status under the old law*, is the savings clause called into play. Only then is a specific exception to § 405 required." 348 U.S. at 546 (Italics supplied).

The Court below, therefore, commented quite appropriately (R. 30):

"On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U.S.C.A. §1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241 (d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a)(1), 8 U.S.C.A. §1251(a)(1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

Through the retroactive deportation provisions of the 1952 Act aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a nondeportable status under

the prior laws had such status preserved. In this way effect can and will be given to all parts of the statute.

(G) Strict Construction of Deportation Statutes.

Respondent is married to an American citizen and is the father of four American children, two of whom are minors. He has been a resident of the United States for more than forty-five years and has led a blameless life for the past fifteen years or more (R. 25).

For him deportation is banishment, and because deportation is such a drastic measure, doubts in statutory construction, if any, are to be resolved in his favor. *Fong Haw Tan* v. *Phelan*, 333 U.S. 10 (1947). This is an added reason, as found below (R. 31), for reaching the conclusion advanced by respondent.

Conclusion

Before an alien, resident here half his life time, is torn away from his wife and children and deprived of all that makes life worth living, the statutory mandate for his banishment should be clear and unequivocal. There is no such precise and explicit Congressional direction here. On the contrary, every known aid in statutory construction leads to the conclusion that Congress intended to preserve respondent's status of nondeportability. We therefore urge that the decision below be affirmed.

Respectfully submitted,

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APPENDIX A

THE IMMIGRATION AND NATIONALITY ACT

SEC. 405(a) Nothing contined in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [s t a t u s-e s], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired

NATIONALITY ACT OF 1940

SEC. 347(a) Nothing contained in either chapter III or in chapter V of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, things, or matter, civil or criminal, done or existing, at the time of this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes repealed by this Act are hereby continued in force and effect.

THE IMMIGRATION AND NATIONALITY ACT	NATIONALITY ACT OF 1940
immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.	
(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.	(b) Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirement of law in effect when such petition was filed.

APPENDIX B

S. 3455, 81st Congress, 1st Sess.

TITLE III—NATIONALITY AND NATURALIZATION

* * * * *

Savings Clause

Sec. 361. (a) Nothing contained in this title, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal brought, or any status, condition, act, thing, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, acts, things, or matters, the statutes or parts of statutes repealed by this Act are hereby continued in force and effect.

(b) Except as otherwise specifically provided in this title, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.